92-790

reme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1992

Pauline Schoch

Petitioner,

v.

Commonwealth of Pennsylvania

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Township Ordinance proscribing criminal penalties for violations constituting a nuisance unconstitutional, as violative of the Fourteenth Amendment to the United States Constitution, when the Ordinance fails to unambiguously identify the conduct constituting a nuisance and an Intermediate State Appellate Court retroactively applied an expanded definition of what constituted a violation in contravention of the state's highest Court's definition?

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

The Parties in this Court are as follows:

Petitioner: Pauline Schoch

Respondent: Commonwealth of Pennsylvania[1]

In the Court from whose judgment review is sought, Petitioner was Appellant and Respondent was Appellee.

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[1] The original proceeding in the Lower Court was captioned as Commonwealth of Pennsylvania v. Pauline Schoch due to the criminal nature of the penalties proscribed by a violation of Penn Forest Township Ordinance No. #88-4. Therefore, the party in interest is Penn Forest Township, Carbon County, Pennsylvania.

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No. _____

IN THE

Supreme Court of the United States

October Term, 1992

Pauline Schoch

Petitioner,

v.

Commonwealth of Pennsylvania

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioner, Pauline Schoch, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania entered in this case on November 19, 1991.

OPINIONS BELOW

The memorandum opinion of the Commonwealth Court of Pennsylvania in Pauline Schoch v. Commonwealth of Pennsylvania is reprinted in the Appendix to this Petition ("App.") p. 1a. The opinion of the Court of Common Pleas of Carbon County in Commonwealth of Pennsylvania v. Pauline Schoch denying Schoch's Post-Verdict Motions for a New Trial and an Arrest of Judgment is reprinted in the Appendix to this Petition App. p. 1b.

JURISDICTION

The Order of the Commonwealth Court was entered on November 19, 1991, and a Petition for Allowance of Appeal was timely filed with the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal on August 10, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C §1257.

FEDERAL STATUTES AND RULES INVOLVED

The relevant federal statutory provision is reprinted in the Appendix. It is the Fourteenth Amendment to the Constitution of the United States, Section 1.

STATEMENT OF THE CASE

This Petition stems from the denial by the Supreme Court of Pennsylvania of Schoch's Petition for Allowance of Appeal of the decision of the Commonwealth Court of Pennsylvania which affirmed the decision of the Court of Common Pleas of Carbon County, Pennsylvania, which denied Schoch's Post-Verdict Motions for a New Trial and an Arrest of Judgment.

On May 31, 1990, Schoch was arrested and charged with a violation of Penn Forest Township Ordinance 88-4 regarding the storage of junk automobile parts. She was convicted before a District Justice and appealed to the Court of Common Pleas.

On November 27, 1990, a Summary Appeal trial was held before the Honorable William W. Lipsitt, S.J., Specially Presiding. After a brief hearing, the Court found the Defendant guilty and denied the appeal. On December 5, 1990, the Defendant timely filed Post-Verdict Motions for a New Trial and an Arrest of Judgment. On March 19, 1991, the Court of Common Pleas denied Schoch's Post-Verdict Motions for a New Trial and an Arrest of Judgment and affirmed Schoch's conviction. On April

17, 1991, Schoch filed a Notice of Appeal to the Commonwealth Court. The Commonwealth Court affirmed the Common Pleas Court decision on November 19, 1991. Schoch then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. On August 10, 1992, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal. Schoch now files this Petition for Writ of Certiorari.

Schoch has raised the Constitutional issue sought to be reviewed by this Honorable Court at every pertinent stage below. It was first raised at closing argument at the Summary Appeal Trial in the Court of Common Pleas. Subsequently, it was raised in Schoch's Post-Verdict Motions, her Commonwealth Court brief and her Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

Schoch has been charged with a violation of Penn Forest Township Ordinance 88-4, which pertains to:

> "the maintenance of property in the Township of Penn Forest requiring the cutting and removal of grass, weeds and noxious vegetation; by prohibiting and regulating nuisances generally, the maintenance of unguarded or abandoned excavation, wells, etc., keeping or storage of debris, garbage, junk, and refuse; and providing for the abatement of prohibited conditions, and proscribing penalties for violations thereof."

Nowhere in the Ordinance is the word "nuisance" defined, except that Section 3, "nuisances generally", refers to the definition as it exists in Chapter 65 of Title 18, The Crimes Code. This definition does not include junk automobiles and their parts.

Section 6 of the Ordinance states:

"Debris, Garbage, Junk and Refuse

A. Junk. No junk shall be kept or stored on any premises or property within the Township unless the

keeping or storage of the same is specifically permitted by the Zoning Ordinance."

Nowhere in Ordinance 88-4 are the conditions of a nuisance defined that must be found before there can be a violation for the storage of junk. Instead, the Ordinance merely defines junk in Section 2 as, in part, "scrapped motor vehicles and parts thereof, including motors, bodies of motor vehicles and vehicles which are inoperable, unlicensed, and do not have a current and valid inspection sticker."

During the Summary Appeal trial, the Commonwealth called only one witness, Sandra J. Funk, the Code Enforcement Officer for Penn Forest Township. Ms. Funk testified that she was actually on the Defendant's property only once, on May 8, 1990 and that she had taken pictures from the adjoining road of the property on another occasion. She further testified that any visibility of the vehicles from the adjoining road would be blocked during the non-winter months by the foliage of the trees on the property. She further testified her best guess was that the nearest vehicle was about 50 feet from the road and did not, in anyway, interfere with the traffic proceeding on the adjacent road, Maury Road or any pedestrians who may be walking on Maury Road. There was no testimony that any persons, including children, walk along Maury Road.

Nowhere in Ms. Funk's testimony did she state that she had received any complaints from anyone in the community, except that the situation had been brought to her attention by the Township Supervisors. Further, she testified that she knew of no children who played in the area around the vehicles, knew of no injuries occurring to anyone in the area, and knew of no rodents infesting the area. She testified, however, that the area around the vehicles was not fenced and that existing in the area were rusted materials and broken glass.

Testimony presented by Schoch was from Milford Schoch, her son, who testified that the vehicles and parts thereof had been

stored on his mother's property for 15-20 years, dating back to when the property was jointly owned by his mother and father. This activity of the Defendant pre-dates by at least 13 years, the effective date of the Ordinance.

Milford Schoch further testified that he makes use of the materials that he gets from the vehicles stored on his mother's property by casting aluminum and making belt buckles, which, for the most part, has been a hobby, but which has also been a source of income for him.

REASONS FOR GRANTING THE WRIT

1. The Pennsylvania Commonwealth Court retroactively applied a broadened definition of what constitutes an actual nuisance bringing Petitioner's conduct within the definition and therefore giving Petitioner no warning his actions were proscribed.

The law of Pennsylvania with regard to the prohibition of nuisances, including the storage of junk automobiles and their parts, as in the case at bar, has been long established by the Pennsylvania Supreme Court case of *Commonwealth v. Hanzlik*, 400 Pa. 134, 161 A.2d. 340 (1960).

In *Hanzlik*, the Court provides a mechanism for salvaging ordinances which merely prohibited the storage of junk automobiles and their parts by requiring proof of an actual nuisance.

The *Hanzlik* standard necessitated proof of loud noises, offensive odors, attraction to vermin, or the possibility of injury to a person from the complained of storage of the vehicles. *Hanzlik*, A. 2nd. at 341.

In the decision of *Teal v. Haverford Township*, 134 Pa. Cmwlth. 157, 163, 578 A.2d. 80, 83 (1990), Petition for Allowance of Appeal Denied 527 Pa. 659, 593 A.2d. 429 (1991).

The definition of what constituted a nuisance in fact was broadened to include danger, inconvenience or distraction. *Teal* was decided on July 23, 1990. Most importantly, the Petitioner was arrested for a violation of Penn Forest Township Ordinance 88-4 on May 31, 1990. Therefore, on May 31, 1990, the only standard of proof that could be applied to determine whether Petitioner's conduct was a nuisance in fact was the *Hanzlik* standard of loud noises, offensive odors, attraction to vermin or a possibility of injury to a person. However, as is clear from the Memorandum Opinion of Judge Collins of the Commonwealth Court of Pennsylvania, the *Teal* standard of public danger, inconvenience or distraction was applied to affirm the conviction of Petitioner (Opinion, p. 7)

Retroactive application of a broadened definition to bring within its ambit the conduct of the Petitioner is in contravention of the well established due process analysis of this Honorable Court. Statutes or Ordinances must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or it is so indefinite that it encourages arbitrary and erratic arrest and the conviction is void for vagueness. *Colautti v. Frankin*, 439 U.S. 378, 390, 99 Sup. Ct. 675, 683, 58 L. Ed. 2nd. 596, 606 (1979).

However, this Court has upheld unconstitutional statutes or ordinances as written when the state's highest court has narrowed the application of the statute to constitutionally permissible limits and that narrowing application took effect in sufficient time to give the defendant fair warning that his conduct is proscribed *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2nd. 98 (1990).

In *Osborne*, a child pornography case, this Court upheld a construction of the Ohio Supreme Court under circumstances where the construction affords fair warning to the defendant that his conduct was proscribed. *Osborne*, supra., U.S. at 116, S.Ct at 1699, L. Ed. 2nd. at 113. In *Osborne*, other cases are con-

trasted, some of which, Petitioner suggests, are directly controlling the case at bar.

For example, in *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2nd. 894 (1964), a trespassing case, the South Carolina Supreme Court expanded the definition of what constituted the crime. This Court reversed the conviction, holding the South Carolina Supreme Court's expansion of the statute was unenforceable as the Petitioner had no reason to suspect his conduct was criminal at the time it was committed *Osborne* supra., S. Ct. at 1700, U.S. at 117, L. Ed. 2nd. at 114.

In *Rabe v. Washington*, 405 U.S. 313, 92 S. Ct. 993, 31 L. Ed. 2nd. 258 (1972), an obscenity statute was broadened by the Washington Supreme Court to reach the conduct of the Petitioner. This Court struck down the broadened application to the Petitioner as the Petitioner had no warning his actions were proscribed when committed. *Osborne* supra., S. Ct. at 1700, U.S. at 117, L. Ed. at 114.

In *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2nd. 260 (1977), this Court held that the Petitioners could not be held to standards of obscenity enunciated in a case handed down by this Court after his arrest. *Osborne* supra., S. Ct. at 118, U.S. at 1700, L. Ed. 2nd. at 114.

It is clear in the case at bar that the Petitioner's conviction was upheld by the Commonwealth Court of Pennsylvania using a broadened definition of nuisance in fact established in *Teal* supra. It is furthermore clear that the defendant's arrest postdated the broadened definition in *Teal* by nearly two months.

Therefore, in order for the Petitioner to be given the fair warning mandated by the Fourteenth Amendment, she could be held to no more than the standard enunciated in the Pennsylvania Supreme Court case of *Hanzlik* supra., which was significantly narrower than that of *Teal*.

The testimony in support of the nuisance, even taken in the light most favorable to the Respondent as verdict winner, was that there were no loud noises, offensive odors, rodents infesting the area, or any children who walked along the adjoining road or played in the area around the vehicles. Therefore, the evidence failed to establish the *Hanzlik* standard of offensive odors, attraction to vermin or the reasonable possibility of injury to a person and at best could be described as inconvenience or distraction, the *Teal* standard.

2. The definition of a nuisance in fact enunciated by the Commonwealth Court of Pennsylvania in Teal is so vague and subjective as to encourage arbitrary and erratic arrests and convictions and is, therefore, violative of the Fourteenth Amendment to the United States Constitution.

Even if this Honorable Court were to determine that Petitioner had sufficient knowledge of the type of conduct proscribed by the Penn Forest Township Ordinance as refined by the Commonwealth Court in *Teal* supra., Petitioner suggests that the *Teal* definition of nuisance in fact is so vague and subjective as to not pass due process scrutiny.

By their own terms, the words "public inconvenience and distraction" are subject to numerous interpretations. What is an "inconvenience" to one person may be a meaningless aspect of day-to-day living to another; what is a "distraction" to one person may not even be noticeable to others.

Allowing a definition so subjective to pass constitutional muster would be defining the law on a case-by-case basis, making elements of the crime so indefinite and uncertain that it could not be enforced as a penal offense. *Ashton v. Kentucky*, 384, U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2nd. 469.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a Writ of Certiorari should issue to review the decision of the Commonwealth Court of Pennsylvania in this case. If the Writ is issued, the Petitioner requests a reversal of Petitioner's conviction.

Respectfully submitted,

John DiBernardino, Esquire
Counsel of Record

APPENDIX

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAULINE SCHOCH,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

No. 884 C.D. 1991
SUBMITTED: September 12, 1991

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE CHARLES A. LORD, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE COLINS FILED: November 19, 1991

Pauline Schoch (Schoch) brings this appeal from an order of the Court of Common Pleas of Carbon County (common pleas court) upholding the Commonwealth and denying Schoch's post-verdict motions for a new trial and for arrest of judgment.

The following factual background gave rise to this appeal. In a proceeding before a district justice, Schoch was convicted of having violated Sections 6A and 6C(2) of Ordinance No. 88-4 (ordinance) of Penn Forest Township (township), Carbon. County, Pennsylvania.

The penalties (set forth in Section 8 of the ordinance) for violations include fines ranging from $100.00 to $300.00 and imprisonment of not less than ten (10) days or more than thirty (30) days. Schoch was fined $300.00, plus $80.00 in costs.

On appeal, after a hearing before the common pleas court, Schoch was again found guilty of having violated the foregoing sections of the ordinance. Schoch filed post-verdict motions for a new trial and for arrest of judgment, both of which were denied by the common pleas court in an order entered March 19, 1991, from which Schoch now appeals.

The ordinance provisions that Schoch was found to have violated provide, in pertinent part, as follows:

> SECTION 6A. - No junk shall be kept or stored on any premises or property within the Township unless the keeping and storage of the same is specifically permitted by the Zoning Ordinance.
>
> . . .
>
> SECTION 6C(2). - The owner or person in control of any private property shall at all times maintain the premises free from debris, garbage, junk and refuse.

Section 2 of the ordinance defines "junk" as "scrapped motor vehicles and vehicles which are inoperable, unlicensed, and do not have a current and valid inspection sticker." Schoch challenges the validity of the ordinance and her conviction thereunder, raising the following issues for our determination: (1) whether the common pleas court erred in finding that the Commonwealth met its burden of proving the scrapped vehicles on Schoch's property constituted a nuisance in fact; (2) whether the common pleas court erred in finding that the evidence submitted by the Commonwealth was sufficient to prove Schoch guilty beyond a reasonable doubt of violating the ordinance; (3) whether the common pleas court erred in finding that the ordinance prohibiting storage of junked vehicles was not void for

vagueness in failing to "unambiguously identify" what conduct is deemed a nuisance in fact; and (4) whether the common pleas court erred in finding that enforcing an ordinance prescribing criminal penalties against a property owner (who had engaged in the proscribed conduct before enactment of the ordinance) was not an unconstitutional retroactive application of a criminal statute.

The test for determining sufficiency of evidence to support a guilty verdict is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences in the Commonwealth's favor, the fact finder reasonably could have determined that all elements of the offense were established beyond a reasonable doubt. *Scott v. Commonwealth*, 134 Pa. Commonwealth Ct. 519, 578 A.2d 1022 (1990). Our review of the record indicates evidence supporting the common pleas court's decision in this regard.

Penn Forest, a township of the second class, derives its authority to prohibit nuisances, including the storage of junked automobiles and scrap, from Section 702 of The Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §65712. The Supreme Court, however, has held that although Section 702 gives a second class township the power to prohibit nuisances *in fact*, it did not give these townships authority to declare or define the storage of junked vehicles to be nuisances *per se*, but only the authority to prove them nuisances *in fact*. *Teal v. Township of Haverford*, 134 Pa. Commonwealth Ct. 157, 578 A.2d 80 (1990), *petition for allowance of appeal denied*, ____ Pa. ____, 593 A.2d 429 (1991).

In the present case, the common pleas court noted that "case law requires the Commonwealth to prove the prohibited condition to be a nuisance in fact in order to enforce this type of ordinance." As the ultimate trier of fact, the common pleas court found that the Commonwealth met this burden of proof.

During the trial, the Commonwealth's one witness, a township code enforcement officer, testified that scrapped motor vehicles, vehicle parts, rusted material and broken glass were kept on Schoch's property in an unfenced area easily visible and accessible to neighboring homes and to an adjacent public road. On cross-examination, the officer admitted that the aforementioned items were 50 feet from the road and had not yet interfered with traffic or pedestrians, were not infested by rats, and had not, thus far, attracted children, or actually injured anyone. In contrast, the only witness for Schoch was her son, who testified that the scrapped vehicles had been stored on his mother's property for a long time (perhaps even prior to the effective date of the ordinance) and that he used some of the scrap material to make belt buckles. Making a credibility determination as fact finder, the common pleas court found that the Commonwealth had succeeded in establishing beyond a reasonable doubt that Schoch had created a clearly visible, hazardous condition on her unfenced property,-i.e., rusted material, broken glass, in addition to the scrapped vehicles, although no injury had yet occurred.

After reviewing the record and this testimony "in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth," we conclude that the fact finder reasonably determined that all elements of the offense were established beyond a reasonable doubt, *Commonwealth v. Aulisio*, 514 Pa. 84, 91, 522 A.2d 1075, 1079 (1987), and that Schoch's storage of the junked vehicles did, in fact, constitute a nuisance.

We further agree with the common pleas court in finding Schoch's second argument to be without merit and in rejecting Schoch's contention that the ordinance is unconstitutionally void for vagueness in failing to unambiguously identify the prohibited conduct that would make storage of junked automobiles a nuisance in fact. In rebutting Schoch's argument,

the Commonwealth points out that not only does the ordinance define the term "junk" but also places specific responsibilities upon property owners to refrain from storing junk on their property "unless specifically permitted by the Zoning Ordinance" and to keep their property "free from debris, garbage, junk and refuse." Further, in refuting Schoch's argument as to the unconstitutionality of the ordinance, the Commonwealth cites a significant body of cases with similar fact patterns in which the validity of comparable ordinances was upheld. *See Commonwealth v. Sadecky*, 41 Pa. Commonwealth Ct. 86, 398 A.2d 1073 (1979); *Talley v. Borough of Trainer*, 38 Pa. Commonwealth Ct. 441, 394 A.2d 645 (1978).

The common pleas court rejected Schoch's "void for vagueness" argument on the basis that Sections 6A and 6C(2) of this ordinance (provided earlier in this opinion) clearly require premises to be kept free from debris and junk and Section 2 includes in its definition of "junk," motors, inoperable and unlicensed vehicles, and vehicles without a valid inspection certificate. After having examined the ordinance's language and weighing the respective arguments of Schoch and the Commonwealth, the common pleas court reasonably concluded that the ordinance is worded so unambiguously as to not foreseeably elicit misinterpretation or arbitrary enforcement.

We now turn to Schoch's argument that the common pleas court erred in ruling that enforcing the ordinance and its criminal penalties against a property owner (who had engaged in the prohibited activity before enactment of the ordinance) was not an unconstitutional retroactive application of the law. In support of this argument, Schoch's only witness was her son who attested to their 13-year practice of storing the junked vehicles. In response, the Commonwealth argues that Schoch was unable to present the common pleas court with any persuasive evidence to justify continuing an activity that had become a nuisance in fact and a hazard to the community's health, safety and welfare.

Finding the code enforcement officer's testimony to be more credible than that of Schoch's son, the common pleas court agreed with the Commonwealth and reasoned that Schoch's offense emanates from her *current* use of her property which creates a *current* threat to public health, safety and welfare, and that no "grandfather" legislation exists to allow her to continue such activities.

Our review of the record leads us to concur with the common pleas court that no prior storage of the junked vehicles, however long-standing, gave Schoch a vested right to continue creating "public danger, inconvenience, or distraction." *Teal* at 163, 578 A.2d at 83.

Accordingly, the decision of the common pleas court is affirmed.

/s/_____
JAMES GARDNER COLINS,
Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAULINE SCHOCH,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

No. 884 C.D. 1991

ORDER

AND NOW, this 19th day of November, 1991, the order of the Court of Common Pleas of Carbon County in the above-captioned matter is affirmed.

/s/_____
JAMES GARDNER COLINS,
Judge

Certified From The Record
Nov. 19, 1991

/s/_____
Deputy Prothonotary
Chief Clerk

IN THE COURT OF COMMON PLEAS
CARBON COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

PAULINE SCHOCH,

Defendant

NO 490 CR 1990

CRIMINAL DIVISION

MEMORANDUM OPINION

Pauline Schoch had been convicted before a District Justice of violation of Penn Forest Township (Carbon County, Pennsylvania) Ordinance 88-4, Sections 6A and 6C(2). An appeal was taken to this Court and after hearing the Defendant was found guilty and the appeal denied. The Defendant then filed post verdict motions for a New Trial and in Arrest of Judgment. Both parties submitted briefs and the matter is presently before the Court for disposition.

The subject Ordinance provides inter alia for the prohibiting and regulating nuisances generally, the keeping or storage of debris and junk, the abatement of prohibited conditions and penalties for violations. Section 6A provides "No junk shall be kept or stored on any premises or property within the Township unless the keeping and storage of the same is specifically permitted by the Zoning Ordinance." Section 6C(2) reads "The owner or person in control of any private property shall at all

times maintain the premises free from debris, garbage, junk and refuse." In Section 2 junk is defined in part as "scrapped motor vehicles and vehicles which are inoperable, unlicensed, and do not have a current and valid inspection sticker."

During the summary appeal trial, the Commonwealth called one witness, the Code Enforcement Officer for the Township and while her testimony was sparse she did say there were scrapped motor vehicles, vehicle parts, rusted materials and broken grass on the property and the area was not fenced. On cross examination she testified the nearest vehicle was about fifty feet from the adjacent road and it did not interfere with traffic or pedestrians; no rodents infested the area; she had no knowledge of children playing around the vehicles and know of no injuries occurring to anyone by reason of the conditions.

The one witness for the defense was Milford Schoch, the son of the Defendant, who testified the vehicles had been stored on his mother's property for a long period, perhaps pre-dating by at least thirteen years the effective date of the Ordinance. He stated he makes use of the scrapped materials by casting aluminum and making belt buckles, which, for the most part, has been a hobby and occasionally he has sold some buckles.

The defense has advanced several issues. First, it is argued the Ordinance is invalid because it does not necessitate proof that the complained-of activity constitutes a nuisance in fact.

The Commonwealth acknowledges that under the case law the Ordinance would be invalid if it merely declared the storage of junked or abandoned vehicles to be a nuisance per se. Because the Ordinance does not declare or define the accumulation of abandoned or junked vehicles a nuisance, a reasonable interpretation of the Ordinance does require the Township to prove a nuisance in fact exists. Thus the Commonwealth argues, and this Court agrees, adopting a reasonable interpretation saves the Constitutionality of the ordinance. Accordingly the contention of the defense, that the failure to define a nuisance necessitating

proof of a factual basis makes the Ordinance invalid or offends Constitutional principles, must fall. *See, Kadash v. City of Williamsport*, 19 Pa. Commw. 643, 340 A.2d 617 (1975).

However, it must be noted, before a person can be convicted pursuant to the terms of the Penn Forest Ordinance, the Commonwealth does have the burden of proving the storage of junked or abandoned vehicles is a nuisance in fact.

This first question presented leads to the second issue — whether the Ordinance in question is unconstitutional as violative of the Defendant's right to due process by its vagueness due to its failure to unambiguously identify the proscribed conduct which must exist for the storage of junked vehicles to be considered a nuisance in fact.

The void for vagueness doctrine is well known and the appellate decisions need not be reviewed. However, in this case, this doctrine is simply not applicable. Without reciting the various sections of the Ordinance again there can be no doubt that in the Township, premises must be maintained free from debris and junk. And "junk" includes motors, inoperable vehicles, unlicensed vehicles and those without a valid inspection certificate. The conduct being prohibited should be easy enough to understand and certainly does not encourage arbitrary and discriminatory enforcement which would not pass constitutional muster.

As stated earlier, the case law requires the Commonwealth to prove the prohibited condition to be a nuisance in fact in order to enforce this type of ordinance.

The third question then is whether or not the evidence here was sufficient to establish beyond a reasonable doubt (the ordinance prescribes criminal penalties) that a nuisance in fact existed. The defense contends the evidence was insufficient. It is pointed out there was not testimony of loud noises, offensive

odors, attraction to vermin, or the possibility of injury to any person — all standards of proof set forth in many cases.

On the other hand, the Commonwealth points out the Defendant has created a hazardous condition on her property even though no injury has as yet occurred. The condition is visible from homes located on either side of her property and the adjacent road is approximately fifty feet away — a comparatively short distance. In addition to the junked and abandoned vehicles which are scattered about the property, the premises are littered with broken glass and rusted materials. Further the said area is not surrounded by any fence and thus easily accessible.

In fairness to the defendant, it does seem to the trier of the facts that the situation in the present case is not as serious as the conditions existing in the several appellate holdings. Nevertheless, it cannot be said that the evidence given by the Codes Enforcement Officer does not establish beyond a reasonable doubt that Schoch has created a dangerous and hazardous condition upon her property. The Commonwealth pictures show not only an aesthetically umpleasing Schoch property but the obvious potential for injury. Surely the police power of the Township enables it to prohibit any activity concerning the health, safety and welfare of the community.

Finally, the Defendant claims the subject Ordinance is unenforceable against this Defendant who has been storing junked automobiles on her property for at least thirteen years prior to the effective date of the Ordinance. To charge the defendant in a criminal prosecution with a violation of conduct allowed prior to the enactment of the Ordinance, is said to be a retroactive application of a criminal offense.

The reasoning here must be faulty. The defendant is not being penalized for something she has done in the past. Nor can it be said that any actual business is conducted on the Schoch premises. The offense lies in the present use of the property which the Township has recognized involves current health,

safety and welfare concerns. There is no law which enables a party to obtain "grandfather" rights to continue such activities forever under such circumstances where a nuisance in fact exists.

In accord with this discussion we issue the following

COMMONWEALTH OF PENNSYLVANIA

vs.

PAULINE SCHOCH,

Defendant

IN THE COURT OF COMMON PLEAS
CARBON COUNTY, PENNSYLVANIA

NO 490 CR 1990

CRIMINAL DIVISION

ORDER

AND NOW, March 19, 1991, the Defendant's post verdict motions for a New Trial and an Arrest of Judgment are denied.

The conviction of the Defendant, Pauline Schoch, for violating Penn Forest Township Ordinance 88-4 is affirmed.

/s/_____
William W. Lipsitt, Senior Judge
Specially Presiding

ORDINANCE NO. 88 - 4

AN ORDINANCE OF THE TOWNSHIP OF PENN FOREST, CARBON COUNTY, PENNSYLVANIA PERTAINING TO THE MAINTENANCE OF PROPERTY IN THE TOWNSHIP OF PENN FOREST BY REQUIRING THE CUTTING AND REMOVAL OF GRASS, WEEDS AND NOXIOUS VEGETATION; BY PROHIBITING AND REGULATING NUISANCES GENERALLY, THE MAINTENANCE OF UNGUARDED OR ABANDONED EXCAVATION, WELLS, ETC., THE KEEPING OR STORAGE OF DEBRIS, GARBAGE, JUNK, AND REFUSE; AND PROVIDING FOR THE ABATEMENT OF PROHIBITED CONDITIONS AND PRESCRIBING PENALTIES FOR VIOLATIONS THEREOF.

It is hereby adopted and ordained by the Supervisors of Penn Forest Township, Carbon County, Pennsylvania as follows:

SECTION 1. Purpose

This chapter is adopted for the purpose of protecting the health, safety, general welfare and property of the inhabitants of the Township of Penn Forest.

SECTION 2. Definitions

The following words of phrase, when used in this chapter, shall have the meanings ascribed to them in this section, except when the context requires a different meaning:

ABANDONED EXCAVATION - One in which further construction has been permanently discontinued or where further construction has been permanently discontinued or where further construction has not been evident for a period of thirty (30) days or more.

DEBRIS - Dead trees, limbs or portions thereof which have become detached and have fallen to the ground, grass clippings, pruning or clippings from trees or shrubs, accumulations of leaves and other such combustible solid wastes.

GARBAGE - Putrescible animal and vegetable wastes resulting from the handling, preparation, cooking and consumption of food.

JUNK - as used in this Ordinance, shall mean discarded materials, articles or things and including but not limited to, scrap metal, paper, rags, glass, containers, scrap wood or lumber, trailers, broken or discarded furniture or household equipment, broken, neglected, abandoned or junked machinery and equipment, scrapped motor vehicles and parts thereof, including motors, bodies of motor vehicles and vehicles which are inoperable, unlicensed, and do not have a current and valid inspection sticker.

OPEN OR UNGUARDED WELL, CISTERN OR CESSPOOL - One which is not securely covered by a cover sufficient to withstand one thousand (1,000) pounds of pressure per each ten (10) square feet of cover area.

PERMANENT FENCE - One which is constructed pursuant to the provisions of the Building Code or Zoning Ordinance of the Township.

PERSON - Any individual, partnership, association, firm or corporation.

REFUSE - Putrescible and nonputrescible solid wastes, both combustible and noncombustible, including ashes, cartons, boxes, excelsior, rubber, leather, crockery, trash, rubbish and rubble and other such wastes which, when deposited as prohibited herein,

tend to create a danger to public health, safety or welfare or create unsightliness.

UNGUARDED EXCAVATION - One which is not completely enclosed by a fence at least six (6) feet in height.

SECTION 3. Nuisances Generally

Any person committing or maintaining a nuisance as defined in and prohibited by Chapter 65 of Title 18 of the Pennsylvania Consolidated Statutes shall be punishable as provided therein. Said Chapter 65 includes provisions pertaining to the scattering of rubbish, the discarding or abandonment of refrigerators and iceboxes with attached lids or doors, the posting of advertisements on property of another, the establishment or maintenance of public or common nuisances and the discarding or abandonment of television picture tubes or television sets containing unneutralized picture tubes.

SECTION 4. Cutting and Removal of Noxious Vegetation

A. It shall be unlawful for any person owning or occupying any property within the Township of Penn Forest to permit any grass or weeds or any vegetation whatsoever which is not edible or planted for some useful or ornamental purpose to grow or remain upon such premises so as to exceed a height of eight (8) inches, to throw off any unpleasant or noxious odor, to conceal any filthy deposit or to create or produce pollen. The cutting of such grass, weeds or other vegetation twice a month in the months of May, June, July, August and September and the removal of the grass, weeds or other vegetation so cut shall be deemed evidence that no violation of this Section shall have been created.

B. The owner of any vacant premises or premises occupied by the owner, and the occupant thereof in the case of premises occupied by other than the owner thereof, shall remove, trim or cut all grass, weeds or other vegetation growing

or remaining upon such premises in violation of any of the provision of this Section.

SECTION 5. Unguarded or Abandoned Wells and Excavations

A. Nuisance declared; abatement required. Any open or unguarded well, cistern, cesspool or abandoned excavation is hereby declared a public nuisance, except as hereinafter provided. Any such public nuisance shall be abated without further notice by the owner of the land of which such public nuisance exists.

B. Guarding of other excavations. All other excavations having accumulated surface or drainage water over a depth of one (1) foot shall have fences, commencing at ground level and extending six (6) feet in height, erected around such excavation at such times and hours that such excavation is not being worked on.

SECTION 6. Debris, Garbage, Junk and Refuse

A. Junk. No Junk shall be kept or stored on any premises or property within the Township unless the keeping or storage of the same is specifically permitted by the Zoning Ordinance.

B. Debris, garbage and refuse. No debris, garbage or refuse shall be stored or allowed to accumulate on any premises or property within the Township except in approved metal or plastic containers for collection, or in plastic bags, so long as the plastic bags are not placed outside more than twenty-four (24) hours before collection, or in areas specifically designated as approved disposal sites by the Township or other governmental agency having authority or control over such disposal.

C. Responsibility or property owners.

(1) Commercial property. Each owner or person in control of any commercial place, shall keep said place, parking fields, parking areas, delivery areas and

other open areas which are a part of such commercial place free from debris, garbage, junk and refuse.

(2) Private premises. The owner or person in control of any private property shall at all times maintain the premises free from debris, garbage, junk and refuse.

SECTION 7. Notice to Abate

Any owner, occupier or tenant of any private property on which any of the foregoing items or conditions shall exist shall, within five (5) days after receipt of notice from the Township to do so, repair, remove, correct or abate such condition. Each day during which any such condition is permitted to exist after said five-day notice period has expired shall constitute a separate offense under this chapter.

SECTION 8. Penalties.

Any person who shall violate any of the provisions of this Ordinance shall, upon conviction thereof, be sentenced to pay a fine of not less than One Hundred ($100.00) Dollars nor more than Three Hundred ($300.00) Dollars, and costs of prosecution, and in default of payment thereof to imprisonment for not less than ten (10) days nor more than thirty (30) days. PROVIDED: Each day's violation of any of the provisions of this Ordinance shall constitute a separate offense.

SECTION 9. Severability.

The provisions of this Ordinance are severable and if any clause, sentence, subsection, section, article or part thereof shall be adjudged by any court of competent jurisdiction or decision shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation and application to the clause, sentence, subsections, section, article or part thereof rendered. It is hereby declared to be intent of the Supervisors that this Ordinance would have been adopted if such illegal, invalid, or

unconstitutional clause, sentence, subsection, section, article or part thereof had not been included therein.

SECTION 10. Additional Remedies.

The Township Supervisor for the Township of Penn Forest may take any appropriate action at law or equity, civil or criminal, to enforce the provisions of this Ordinance, and this Ordinance shall in no way restrict any remedies otherwise provided by law.

SECTION 11. Effective Date.

This Ordinance shall become effective ten (10) days after the date of its adoption by the Supervisors.

DULY ENACTED AND ORDAINED, by the Supervisors of the Township of Penn Forest, Carbon County, Pennsylvania, this 5th day of December 1988.

TOWNSHIP OF PENN FOREST

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1

Citizens of the United States

All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

92-790

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

No. 92-790

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAULINE SCHOCH,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioner has filed this Petition for Writ of Certiorari under 28 U.S.C. § 1257(a), invoking the due process clause of the fourteenth amendment and claiming that her due process rights were violated by the allegedly retroactive broadening of the definition of nuisance which, even if not retroactively applied to her, is impermissibly vague and subjective.

This case was first heard by the local district justice, who found the Petitioner guilty of violating Penn Forest Township Ordinance 88-4 as to the storage of junk automobile parts (Petition for Writ of Certiorari at 2 (hereinafter "Petition")). On appeal before the Court of Common Pleas, the court again found the Petitioner guilty and affirmed her conviction (Petition, App.

1b). Thereafter, the Commonwealth Court also affirmed her conviction (Petition, App. 1a). The Petitioner, finally, filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which that court denied (Petition at 2). The Petitioner has now filed the instant Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Petitioner, although attempting to frame her question using constitutional terms, has not raised a constitutional issue, but has merely raised again the issue of sufficiency of the evidence. That issue is in the province of and has been decided by the courts of Pennsylvania, with results uniformly against the Petitioner.

The Petitioner has not raised a conflict between Pennsylvania law and

federal law. Neither has the Petitioner shown a constitutionally incorrect application of Pennsylvania law. Rather, the result reached by the trial court, affirmed by the Commonwealth Court, and refused review by the Pennsylvania Supreme Court is amply supported by the evidence in the record and by prior case law. This case is, therefore, not in the character of cases that justify consideration by this Court because of special and important reasons.

ARGUMENT

I. THE QUESTION PRESENTED DOES NOT INVOLVE ANY SPECIAL OR IMPORTANT REASON FOR REVIEW SUCH AS WOULD BRING IT WITHIN THE CHARACTER OF REASONS THAT SUPPORT A GRANT OF CERTIORARI BY THE UNITED STATES SUPREME COURT.

Whether the question presented merits consideration by this Court is dependent upon whether there are "special

and important reasons" for granting certiorari. Sup. Ct. R. 10.1. The question presented in this case simply does not come within the kind of circumstances that the Court has described as justifying its consideration. For a conflict which would justify certiorari to exist, a Pennsylvania court of appeals would have to have made a decision about the application of criminal penalties for nuisance that "has not been, but should be, settled by this Court, or [that was] decided . . . in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). No such decision was made in this case, either directly or indirectly.

The Petitioner's invocation of the fourteenth amendment and the implication that Pennsylvania courts have not honored applicable due process standards might,

at first glance, appear to indicate a possible conflict with a holding of this Court on a federal question, which would be a possible basis for consideration by this Court under Sup. Ct. R. 10.1(c). Upon close view, however, it is clear that no such conflict exists.

The Petitioner has attempted to characterize this case as presenting a serious constitutional question on the issue of retroactive application of criminal sanctions. Petitioner presents her question as whether the application of a "broadened" nuisance standard can be upheld as consistent with constitutional due process requirements. The actual question that the Petitioner is raising, however, is merely a question of the sufficiency of the evidence. Pennsylvania appellate level courts have already re-

viewed that question and have declined to reverse the district judge's decision.

The Petitioner correctly states that the standard in nuisance matters requires a finding of actual nuisance (Petition at 5). She also correctly points out that the evidence did not affirmatively show loud noises, offensive odors, rodents presently infesting the area, or the presence of children in the immediate area (Petition at 8). She mistakenly concludes from these points, however, that a broadened law was retroactively applied to her and that her due process rights were violated (Petition at 6).

The Petitioner has mischaracterized the history of Pennsylvania law on nuisance. Both the Commonwealth Court, which affirmed the guilty verdict from the Court of Common Pleas, and the Pennsylvania Supreme Court, which denied the

request for appeal, were well aware of the State's long-standing standard of proof in nuisance cases, and neither held that any other standard should be applied. On the basis of (1) the Commonwealth Court's specific statement that nuisance in fact is required, (2) its knowledge that the standard of proof in criminal cases is proof beyond a reasonable doubt on every element of the offense and of what constitutes a nuisance under Pennsylvania law, and (3) its affirmance of the verdict of the Court of Common Pleas on the basis of the obvious correctness of the result, it is clear that the decisions of both the Commonwealth Court and the Pennsylvania Supreme Court followed due process requirements, rather than ruling in conflict with them.

The Petitioner's argument is apparently based on the mistaken assumption

that because the Commonwealth Court invoked Teal v. Haverford Township, 134 Pa. Commw. 157, 578 A.2d 80 (1990), allocatur denied, ___ Pa. ___, 593 A.2d 429 (1991), which post-dated the Petitioner's arrest, its determination and its affirmance were not supported by the correct standard for nuisance (Petition at 6). The Petitioner's assumption is erroneous, in the first place, because the Commonwealth Court relied on Teal only for the principle that township authority to prohibit nuisances was limited to proving nuisance in fact (See Petition, App. 3a), not for the standard of proof for showing nuisance in fact. Her assumption is erroneous, furthermore, because the only requirement for affirmance is that the result below be correct and supported by sufficient evidence. See, e.g., Dauphin County Technical School v. Dauphin Coun-

ty, 483 Pa. 604, 398 A.2d 168 (1978) (decision by a lower court may be affirmed if it represents a correct result, regardless of whether or not the reasoning behind the decision was correct); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (same).

Even if the court did invoke a case which post-dated the offense in affirming the Petitioner's conviction, that would not raise a constitutional issue necessitating review by this Court unless the state courts also used, or approved, an incorrect standard. That was clearly not what happened in this case. First, as shown infra, Teal did not create a new and different standard. Second, even if it had done so, the affirmance of the Petitioner's conviction was consistent with and supportable under the prior law.

Regardless of the cases invoked, there was no error in the decision. On the facts of the case, there was no issue of reasonable doubt either at the trial or the appellate level. The evidence showed, beyond a reasonable doubt, that the Petitioner was in violation of the ordinance provisions, as charged.

II. THE DECISION IN THIS CASE AT THE STATE LEVEL WAS NOT IN CONFLICT WITH FEDERAL CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

The Petitioner attempts to base her Petition on two due process arguments, both of which appear to be based on the premise that she had no warning that her actions were proscribed (See Petition at 5, 8). Her first argument is that a broadened definition of actual nuisance was retroactively applied by the Commonwealth Court, bringing her conduct within

the definition of nuisance in fact without notice to her that her conduct was proscribed. Her second argument is that the State's redefinition of nuisance fails to meet constitutional due process requirements because it is vague and subjective. As outlined infra, neither of these arguments has any merit and neither provides reason for review by this Court.

A. The State's Definition Of Nuisance Was Not Broadened In Teal, But Even If It Was, A Broadened Definition Was Neither Applied Improperly To Convict The Petitioner Nor To Affirm Her Conviction.

The Petitioner cites only two Pennsylvania cases in support of her argument that the nuisance standard applied to her case was a broadened standard which was retroactively applied to her: Commonwealth v. Hanzlik, 400 Pa. 134, 161 A.2d 340 (1960), and Teal v. Haverford

Township, supra. Obviously, there were many nuisance cases decided in Pennsylvania in the 30 years between those two decisions. A review of some of those intermediate cases makes it clear that, contrary to the Petitioner's argument, Teal did not broaden the standard, but merely restated a well-established standard.

As a preliminary matter, the Commonwealth Court in Teal left no room for doubt that the appropriate standard remains "nuisance in fact." Teal v. Haverford Township, supra, 578 A.2d at 82. The court in Teal, furthermore, did not invalidate the township's prohibition of the storage of disabled vehicles for more than 72 hours. Id. Rather, the court found that the township had failed to show that the vehicles on Teal's property constituted a nuisance since the

evidence did not establish, or even infer, that the vehicles posed any public danger, inconvenience, or distraction. Id. at 82-83.

In 1988, several years before this Petitioner's arrest and conviction, the Commonwealth Court stated that

> to constitute a public nuisance, the conduct must be an inconvenience or troublesome offense that annoys the whole community in general[.]

Feeley v. Borough of Ridley Park, 121 Pa. Commw. 564, 551 A.2d 373, 375 (1988) (emphasis added). In Feeley, the offense was the improper keeping of numerous cats that resulted in an odor which was an annoyance to the neighbors. In the present case, the offense was the improper keeping of junk that resulted in an eyesore which was an annoyance to the general public. It can scarcely be questioned that just as certain conditions can create an olfactory annoyance, so

other conditions can create a visual annoyance. While the annoyance in Feeley affected only the neighbors, the annoyance in the present case affected both the local area and the larger community of those that traveled on the adjacent main thoroughfare.

Admittedly, under Pennsylvania law, aesthetic considerations alone are insufficient to support a conclusion that the operation of a legitimate business is contrary to the best interests of the community. Rogalski v. Township of Upper Chichester, 406 Pa. 550, 178 A.2d 712, 714 (1962). A legitimate business, therefore, may not be prohibited per se. Commonwealth v. Christopher, 184 Pa. Super. 205, 132 A.2d 714, 717 (1957) (operation of junkyard as legitimate business, while offending aesthetic taste, is not a nuisance per se). It was these

very principles that led to the Hanzlik decision, upon which the Petitioner in this case wishes to rely.

In Hanzlik, the Supreme Court of Pennsylvania struck down the township ordinance which declared that the storage of abandoned or junked automobiles was, per se, a nuisance. Commonwealth v. Hanzlik, supra, 161 A.2d at 343. Hanzlik involved the conviction, under the ordinance, of the operator of a junkyard business. Id. at 341. The court noted that the business involved no loud noises or offensive odors, attracted no vermin, and was not injurious to the public. The court stated:

> "In our case there was no testimony adduced from which we may find that the operation of appellant's [appellees' here] business constituted a nuisance in fact nor was there any testimony to the effect that conditions in the township generally made the business of

> storing junked or abandoned automobiles a nuisance."

Id. (quoting the court below (emphasis added)).

Clearly, the court's reference to conditions in the township generally that could make the business of storing junk a nuisance contemplates a far broader standard for nuisance than the one stated by the Petitioner (See Petition at 5). The standard which the Petitioner would enshrine merely incorporates the list which preceded the above-quoted language --a list which merely noted that certain conditions, which in and of themselves would clearly constitute nuisance in fact, had not been shown, a list which was obviously not intended to be a statement of a definitive, exclusive standard on nuisance.

The definitive standard, in fact, had been stated much earlier by the Supreme Court of Pennsylvania:

> ["]In legal phraseology, the term 'nuisance' is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecedent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage."

Kramer v. Pittsburgh Coal Co., 341 Pa. 379, 19 A.2d 362, 363 (1941) (quoting 46 C.J. at 646). Pittsburgh Coal, of course, also involved the conduct of a business. Importantly, while a municipality may not prohibit a legitimate business by denominating it a per se nuisance, a municipality may control the location of certain activities, business or otherwise. Furthermore, what may not

constitute a nuisance in one location may very well do so in another.

In the present case, the challenged ordinance did not prohibit junkyard businesses or declare them to be nuisances per se. Rather, under Penn Forest Township Ordinance 88-4 § 6A, it prohibited the storing of junk, except where specifically permitted by the zoning ordinance (Petition, App. 4c). The ordinance in the present case, therefore, does not fit within the Hanzlik prohibition from unauthorized declarations of what constitutes a nuisance per se. The violation in the present case, however, does fit within the other kinds of nuisance, not found to exist in Hanzlik, which result from nuisance in fact or from conditions in the Township that make storing junked or abandoned automobiles a nui-

sance. See Commonwealth v. Hanzlik, supra, 161 A.2d at 341.

The storing of junk in this case constituted a nuisance in fact because of the conditions on the property, in and of themselves, and because of the conditions in the Township.

The uncontroverted evidence showed rusted materials and broken glass in an unfenced area adjacent to residential dwellings--a clearly hazardous condition with the potential for injury (See Petition, App. 4a, 4b). It also showed abandoned vehicles in high grass--a clearly potential, if not actual, site for rodents, snakes, and mosquitoes, as well as a significant eyesore along the main artery in and out of the Township for tourists and residents alike (See Petition, App. 2b).

Contrary to the Petitioner's assertion, it is not necessary under Pennsylvania law to show actual infestation of a property or to show actual injury to a person in order to declare the conditions on a property to be a nuisance in fact. See Groff v. Commonwealth, 100 Pa. Commw. 135, 514 A.2d 300 (1986), allocatur denied, ___ Pa. ___, 529 A.2d 1083 (1987) (conviction for violating ordinance prohibiting nuisance on private property by storage of one sole, unlicensed, unregistered motor vehicle upheld on basis of potential hazard). A landowner properly may be found guilty of storing junk on private property in violation of an ordinance, even without a specific finding of public hazard. Scott v Commonwealth, 134 Pa. Commw. 519, 578 A.2d 1022 (1990) (the condition of vehicles without stickers, surrounded with high weeds,

with substantial amounts of litter and creatures was, additionally, a nuisance in fact). In the present case, the Court acknowledged that the conduct did not involve any business activity and specifically agreed that the evidence established beyond a reasonable doubt that dangerous and hazardous conditions existed on the Petitioner's property (See Petition, App. 4a, 4b). No more was required.

In Commonwealth v. Sadecky, 41 Pa. Commw. 86, 398 A.2d 1073, 1075 (1979), the court specifically stated that a haven for rodents is a nuisance in fact and that it is not necessary to prove actual injury in order to establish a nuisance in fact. Clearly, the junked automobiles abandoned in high grass on the Petitioner's property in this case provided a breeding ground for rats,

snakes, and similar creatures--whether or not such creatures had actually been observed. Similarly, the rusted auto parts and broken glass constituted a hazardous condition--whether or not any children had actually been seen on the property.

These principles apply even in cases involving legitimate business activities, which cannot be prohibited as nuisances per se, as noted supra. In another Pennsylvania case, the court found similar property conditions to those in the instant case: wrecked, junked, and abandoned vehicles, auto parts, and broken glass. Talley v. Borough of Trainer, 38 Pa. Commw. 441, 394 A.2d 645, 646 (1978). The court found that the actual condition of the property, notwithstanding the fact that it was the site of a legitimate automobile body repair business, was such as "to give rise to a conclusion that the

storage of wrecked, junked, and abandoned vehicles thereon constituted a public hazard and, thereby, a nuisance in fact." 394 A.2d at 646. In the current case, similarly, the conditions on the property constituted a public hazard and a nuisance per se.

B. The Teal Definition Of Nuisance Is Not Unconstitutionally Vague And Subjective.

In a similar challenge to that of the Petitioner, a property owner contested a sign prohibition, claiming that the ordinance was unconstitutionally vague. H.A. Steen Industries, Inc. v. Cavanaugh, 430 Pa. 10, 241 A.2d 771 (1968). The Pennsylvania Supreme Court found the argument to be without merit, as the ordinance plainly prohibited the plaintiff's signs. 241 A.2d at 777. In the present case, the Petitioner does not

even claim that the ordinance is vague, nor could she reasonably do so (See Petition, App. 2c-5c). As the Pennsylvania courts found, the prohibited conduct under the ordinance should be easy enough to understand (Petition, App. 5a, 3b). Instead, the Petitioner is now claiming that the standard for nuisance under Teal is unconstitutionally vague.

As discussed supra, while the Commonwealth Court may have cited the Teal case, the Teal standard is simply not a new or broadened standard. It is the same standard used in Hanzlik and in all the cases thereafter. The only law which is legitimately relevant to the Petitioner's vagueness argument, in any case, is the Township ordinance under which the Petitioner was convicted. That ordinance could scarcely have been more clear as to what conduct is prohibited. While the

Petitioner may not like the ordinance, she can hardly argue that she was without adequate notice as to what conduct was prohibited.

III. THE TEAL DEFINITION OF NUISANCE WAS NOT RETROACTIVELY APPLIED TO THE PETITIONER IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE CONSTITUTION.

The Petitioner argued to the Pennsylvania courts that application of the ordinance to her constituted retroactive application of a criminal offense because placement of junk on her property predated the ordinance (Petition, App. 4b). The courts below determined that this was not a retroactive application of a new law to prior conduct, but rather a current application of the law to current conduct (Petition, App. 4b-5b, 6a). This conclusion is consistent with the result in Commonwealth v. Barnes & Tucker Co.,

455 Pa. 392, 319 A.2d 871 (1974) (concluding that application of nuisance law to condition which existed on date that law became effective was not an impermissible retroactive application even though condition resulted from events which occurred prior to that date). Having lost the retroactivity argument at every stage of the state proceedings, the Petitioner now attempts to argue that a broadened definition of nuisance was retroactively applied to her by the Commonwealth Court, in violation of the federal Constitution, in its affirmance of the decision of the Court of Common Pleas.

As discussed supra, the standard used by the Commonwealth Court was not a broadened standard at all, but merely a restatement of the long-established standard. Even if the Commonwealth Court had affirmed on the basis of a broadened

standard, however, there is no issue meriting review by this Court unless a constitutionally correct standard would have required reversal of the decision of the Court of Common Pleas. It is clear that the Court of Common Pleas applied a nuisance-in-fact standard (Petition, App. 3b). It is equally clear that its decision was based on the "obvious potential for injury" from the "dangerous and hazardous condition" on the Petitioner's property (Petition, App. 4b). It is, finally, clear that the decision of the Court of Common Pleas is supportable under cases, discussed supra, which predate both Teal and the Petitioner's conviction. The Petitioner's reason as to why this Court should grant the Writ of Certiorari is simply makeshift and without any legal or factual basis.

The Petitioner attempts to obtain review in this case by putting the cart in front of the horse. The cases cited by the petitioner in support of her retroactive application argument involved judicial interpretation of legislation, whereby the scope of prohibited conduct was either narrowed or broadened in order to save the applicable provision against a constitutional challenge (Petition 6-7). In the present case, by contrast, the scope of prohibited conduct under the ordinance was neither narrowed nor broadened by the decision in Teal or by any other decision.

Most of the cases by which the Petitioner attempts to support her retroactivity argument involve limitations on rights which are explicitly protected by the Constitution. See Osborn v. Ohio,

495 U.S. 103, rehearing denied, 496 U.S. 913 (1990) (first amendment right of freedom of expression); Colautti v. Franklin, 439 U.S. 379 (1979) (right to choose); Marks v. United States, 430 U.S. 188 (1977) (first amendment); Rabe v. Washington, 405 U.S. 313, rehearing denied, 406 U.S. 911 (1972) (same). By contrast, there is no constitutionally protected right to any given use of property. Rather, the only constitutional protections of property rights are that property may not be taken without just compensation and that individuals may not be deprived of property without due process of law. See United States Const. amends. V and XIV.

Under the guise of her constitutional arguments on retroactivity and vagueness, the Petitioner is really challenging the Township's exercise of its police

power through the ordinance which prohibits storage of junk, except as permitted by the zoning ordinance, and through the zoning ordinance, which does not permit the storage of junk on her property. As the Court of Common Pleas aptly noted,

> [s]urely, the police power of the Township enables it to prohibit any activity concerning the health, safety and welfare of the community.

(Petition, App. 4b.)

Although the Pennsylvania Supreme Court has not revisited the question of whether aesthetic considerations alone can justify police regulation, the regulation in this case was clearly concerned with more than aesthetics and was concerned with promoting the public safety. The challenged provisions of the ordinance were not unreasonable means for accomplishing that goal, nor were they unconstitutionally vague.

Upholding a similar ordinance, the Commonwealth Court of Pennsylvania acknowledged the potential health hazards from open storage of abandoned vehicles and the rational relationship between their prohibition and legitimate public ends. Groff v. Commonwealth, supra, 514 A.2d at 301 (upholding conviction for unauthorized storage of a single unlicensed and unregistered vehicle); cf. H.A. Steen Industries, Inc. v. Cavanaugh, supra (ordinance prohibiting signs within 150 feet of boulevard was neither vague nor unreasonable and was a legitimate exercise of police power). This is simply not a case like Bouie v. City of Columbia, 378 U.S. 347 (1964), in which the defendant had no reason to suspect at the time that his conduct was criminal. Under both the ordinance and the case law, the Petitioner in the present case had

crystal-clear warning of exactly what conduct was prohibited.

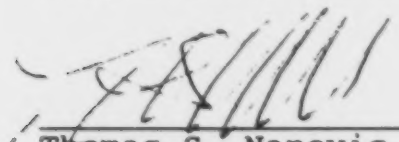
CONCLUSION

The Petitioner, rather than raising a serious constitutional issue, has merely attempted to raise again an issue of sufficiency of the evidence. This issue has already been passed upon by the courts of Pennsylvania with uniform results. If anything, this Petition merely represents an attempt to have yet another bite at the apple or, perhaps, to circuitously challenge the Township's police power, despite ample support in the evidence for the result reached by the trial court, affirmed by the Commonwealth Court, and refused review by the Pennsylvania Supreme Court.

The Petitioner certainly has not raised any conflict between Pennsylvania

law and any standards for nuisance required by the United States Constitution. This case is not in the character of cases that justify consideration by this Court because of special and important reasons. The Court should, therefore, deny this Petition for Writ of Certiorari.

Respectfully submitted,



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